No. 18783

In the

United States Court of Appeals

for the Ninth Circuit

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation,
Appellant,

vs.

ALICE WILLENE WILLIAMSON, a minor; JOHN BRENKMAN, a minor; CARL E. BRENKMAN; C. W. WADDOUPS; CLARA R. WADDOUPS; and SARA R. MURRY, dba RUDOLPH CHEVROLET,
Appellees.

Brief of Appellees

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No. 18783

In the

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State Farm Mutual Automobile Insurance Company, a corporation,
Appellant,

vs.

Alice Willene Williamson, a minor; John Brenkman, a minor; Carl E. Brenkman; C. W. Waddoups; Clara R. Waddoups; and Sara R. Murry, dba Rudolph Chevrolet,
Appellees.

Brief of Appellees

JURISDICTION

There appears to be no question regarding the Court's jurisdiction in this case. There is diversity of citizenship and the controversy involves more than $10,000.00 (R. 1 and R. 9 and 16)*. 28 U.S.C. Sec. 1332. The action was

*For the sake of clarity and convenience appellees will make reference to the transcript of record of this case in the same manner as has appellant in its brief. That is, Volume 1, which comprises the documentary record, will be designated by reference in parenthesis to R and the appropriate page number. Volume 2, which comprises the transcript of the evidence and proceedings at trial, will be designated by reference in parenthesis to T and the appropriate page number.

brought by appellant pursuant to 28 U.S.C. Sec. 2201 seeking a declaratory judgment regarding its liabilities and obligations under a policy of automobile liability insurance (R. 5). Appellant alleged in its Complaint that the case involves an actual controversy (R. 1) and appellees admitted the truth of this allegation (R. 9 and 16).

The cause was tried before the Honorable John C. Bowen on the 19th and 20th days of March, 1963, in Phoenix, Arizona and at the conclusion of the trial, judgment was given for defendants in accordance with the jury's special verdict on the 21st day of March, 1963 (R. 37-40). On the 28th day of March, the Court entertained appellant's Motion For a New Trial or in the Alternative, Motion For Judgment in Accordance With Motion for Directed Verdict, and on the same day denied both motions (R. 56-57). Appeal from the Court's judgment was commenced on the 19th day of April, 1963, when appellant filed its Notice of Appeal (R. 57). Commencement of the appeal and all further steps taken by appellant in prosecuting it have been under the authority of Rules 73 through 76 of the Federal Rules of Civil Procedure. This Court has jurisdiction under authority of 28 U.S.C. Sec. 1291.

STATEMENT OF THE CASE

A. Nature of the Action.

Appellant issued its policy of automobile liability insurance to Ray A. Judd and Lucille B. Judd, hereinafter for convenience called "Judds", which policy contained the following clause:

> "Under Coverages A, (personal injury liability) and B (property damage liability), the unqualified word "insured" includes (1) the named insured, and also includes (2) his relatives, (3) any other person while

using the automobile, provided the actual use of the automobile is with the permission of the named insured."

Said policy was in effect on the 28th day of February, 1959, when a 1957 Chevrolet owned by the Judds and insured under said policy was involved in a collision which resulted in personal injuries to the appellee John Brenkman. The foregoing facts are established by the pleadings (R. 3 and R. 9 and 16).

At the time of the accident the automobile was being driven by Alice Willene Williamson, hereinafter for convenience called "Willene" (T. 62). She was operating the automobile with the express permission of Kenneth Judd, hereinafter for convenience called "Kenneth" (T. 62, 77 and 104). Kenneth is the son of the named insureds and at that time lived with them as a member of their household (T. 82).

The Judds and their son, Kenneth, each testified that there had been a set of rules suggested regarding Kenneth's use of the family automobile (T. 20-21, 56-57 and 84-85). However, each also testified that as a matter of practice he disregarded these rules (T. 21-22, 57-58 and 89).

It was asserted that one of these rules was that Kenneth was not to delegate use of the automobile to others (T. 11, 48-49 and 85). Based on this assertion, it is contended by appellant that Willene's operation of the automobile on the day in question is not within the above quoted clause of appellant's insurance policy because it was not permissive.

However, there are other facts which shed light on the circumstances under which Willene was operating the automobile when the accident happened. First, it is important to note that she had a dual purpose; ie., she indended to

procure an Arizona driver's license for herself and to purchase gasoline for the Judds' automobile and then to pick Kenneth up and take him home, all under the instructions and at the request of Kenneth. She was on her way back to pick Kenneth up when the accident happened (T. 104). Her operation of the automobile at the time of the accident, therefore, was of benefit to, and in the interests of, Kenneth and his parents.

After the accident happened, Willene claimed coverage under the Judds' contract of insurance with appellant in making her accident report to the State of Arizona. Appellant received actual notice of this fact, yet failed to notify the appropriate authorities of the State of Arizona that it denied the coverage which Willene claimed. The foregoing facts are a matter of stipulation between counsel for appellant and appellees (T. 132-133).

Appellees feel it is important to notice that there was apparently a close relationship between Willene and Kenneth at the time of the accident. Willene lived with her family in a separate dwelling which was rented from the Judds, but which was very near the Judds' dwelling and in fact was on the same lot (T. 16, 49, 61½ and 82). They had been dating and within a few weeks after the day when the accident happened, they were married (T. 18, 49, 61½ and 82).

B. Issues Presented by the Pleadings.

In its Complaint appellant alleged that the Judds' instructions and orders were violated by Kenneth when he permitted Willene to use his parents' automobile. It is also alleged that Willene has been named as a defendant in a suit for personal injuries brought by John Brenkman through his guardian ad litem in the Superior Court of the State of Arizona in and for the County of Maricopa. Appel-

lant sought declaratory judgment that it was not obligated to defend Willene in the personal injury action or to pay any judgment which might be rendered against her in that action (R. 1-5).

In their Amended Answers appellees denied that Willene's operation of the Judds' automobile was not permissive. Appellees further alleged that appellant had failed to deny coverage to the Financial Responsibility Section of the Arizona Highway Department in accordance with the Arizona statutes. They sought judgment that, pursuant to its policy, appellant is required to defend Willene in the personal injury action and to pay any judgment which may be obtained against her to the extent of the limits of said policy (R. 9-11 and 16-18).

The pleadings, therefore, raise two issues:

> First: Was Willene's use permissive so as to be within the omnibus clause of appellant's policy of automobile liability insurance?
>
> Second: Are appellant's obligations under its policy affected by a failure to deny coverage in accordance with the financial responsibility statutes of the State of Arizona?

C. Evidence Presented to the Jury.

At the trial of this cause, the jury heard the testimony of the Judds, their son, Kenneth, and of Willene (T. 2). The insurance policy which appellant issued to the Judds and which appellees claim affords coverage to Willene was admitted as plaintiff's Exhibit No. 1 (T. 10). The jury were informed of the stipulation entered into by counsel for the parties regarding the claim of coverage by Willene to the Financial Responsibility Section of the Arizona Highway Department and appellant's failure to deny coverage (T. 135-136). In addition, the jury received testimony from Carl

Brenkman, the father of the injured boy, who was named as a defendant in this action but had agreed not to contest it and to be bound by whatever judgment was entered (R. 8). Finally, defendants' Exhibit A which is an agreement or purported agreement between appellant and Willene was admitted (T. 126).

Plaintiff's Exhibit No. 1 establishes the fact of insurance and the language of the policy without dispute. The testimony of Kenneth and Willene and of the Judds deals largely with the conduct of the parties at the time of and prior to the day in question and the circumstances surrounding Willene's operation of the Judds' automobile at the time of the accident. The facts agreed upon by stipulation, the testimony of Carl Brenkman, defendants' Exhibit A, and portions of the testimony of Willene, Kenneth and Ray A. Judd, relate to appellant's actions following the accident.

D. Verdict and Judgment.

The case was submitted to the jury on a form of special verdict which required only that they determine whether or not Willene was operating the automobile at the time of the accident with the implied permission of the Judds (T. 146-148). The jury having answered this special verdict affirmatively (T. 159-160 and R. 37), appellees moved the Court for entry of judgment and presented a form of written judgment to the Court to be settled and approved (T. 164). After hearing certain objections by appellant regarding the language of this written judgment as it applied to plaintiff's obligations to Willene, who had failed to appear in the action in person or through an attorney (T. 164-167), the Court entered judgment in accordance with said written form (R. 38-40).

E. Issues Raised on Appeal.

In its brief appellant raises only two issues. These are:

First: Whether or not the evidence can support the jury's finding.

Second: Whether or not the instruction which the Court gave regarding the definition of implied permission is proper.

On the first issue, appellant's argument is basically that since there is evidence that the Judds expressly forbade Kenneth to allow others to use the family automobile, the jury was not justified in finding that they permitted such use by implication. With regard to the second issue, appellant's argument seems to be that the jury should have been given specific notice that one must have knowledge of an event if he is to permit it to occur.

Appellees' position with regard to these arguments is expressed below in a separate portion of this brief.

ARGUMENT

A. Summary.*

Appellees do not quarrel with the proposition that permissive use cannot be implied under circumstances where there has been a genuine, meaningful and intended prohibition against such use. We do contend, however, that there was ample evidence presented to the jury to show that the instructions which were assertedly given by the Judds regarding delegation of the use of their automobile by

*No references to the record or citations to authority are set forth in the Summary of appellees' argument. Such references and citations are given following the Summary in the sections of this brief which contain an expanded discussion of the various points relied on by appellees.

Kenneth were not genuine, not meaningful and that the Judds, therefore, did not actually intend that they be followed. Kenneth was given a set of rules for the use of the family automobile prior to the time he became licensed to drive. During the several years he had been using the family automobile, he had shown a disregard for these rules and had repeatedly and continually broken each and all of them. Even so, his parents continued to allow him the use of their automobile and had gone so far as to provide him with his own set of keys and give him blanket authority to use it to go to school. The evidence is clear that the Judds knew of their son's pattern of disbehavior and we contend that the jury was certainly entitled to believe that they realized on the day in question that he would not be bound by whatever instructions they might have given him in the past. The jury apparently felt that Kenneth's violations bore the stamp of approval of his parents, or at least that they did not object to them so seriously as to prevent a recurrence by denying him use of the automobile.

Appellant has ignored the significance and effect of its failure to return the FR-1-A Form to the Financial Responsibility Section of the Arizona Highway Department. This form was received by appellant some time after the accident, showing that Willene claimed coverage under the Judds' policy. Appellant failed to inform Financial Responsibility Section that it denied that Willene was covered under the Judds' policy and we contend that the jury was justified in believing that when it neglected to deny coverage, appellant was acting on the true state of the facts. It must be remembered that the jury was not required to believe all or any of the direct testimony of the witnesses. Their credibility and the weight to be given their testimony are matters for the jury to consider and decide. There were

indications that the veracity of the witnesses might be questioned. Mr. Judd disclosed that he had aligned himself with plaintiff in the case. Mrs. Judd gave testimony on what we believe to be an important point diametrically opposed to her sworn testimony given earlier. Kenneth established himself, and his parents helped him, as one who had established a pattern of lying about his use of the family automobile. Opposed to the direct testimony of these witnesses to the effect that Kenneth had only a limited authority to use the automobile, is the circumstancial evidence of appellant's failure to deny coverage to the State. The evidence shows that it was informed of the accident and contacted the Judds and Willene shortly after it happened, yet still failed to inform the State of the position which it now takes and which it asked the jury to accept.

Appellant complains that the instruction on implied permission might lead the jury to give a verdict against it even though the events which took place were in no way caused by them and took place entirely without their knowledge. It contends there can't be permissive use without knowledge of the use. This argument seems to require an inquiry into the meaning of the verb "permit". We contend that to give permission necessarily implies the power and ability to prevent the act in question, and the ability to prevent implies knowledge of the act. No one would seriously urge that one "permits" an event to happen which is in no way caused by him and takes place entirely without his knowledge. The meaning and concept of permission is relatively simple and commonplace and must be considered to have been within the grasp of the jury. That meaning and concept includes the element of knowledge, and we urge that the jury cannot have been misled even though the knowledge requirement was not expressly pointed out to them. If we cannot com-

municate our thoughts to a jury using such simple terms as "permission" without further embellishment, then the whole jury system stands in danger. In any event, appellant failed to make known its exceptions and objections to the trial court and is now for the first time on this appeal presenting its complaint.

Appellees contend that even if the validity of appellant's arguments were conceded, there should be no reversal. There is no conflict but that the Judds gave express permission to Kenneth to use their automobile and that he in turn gave express permission to Willene. Under such a set of facts, we urge that Willene should be afforded coverage under appellant's omnibus clause as a matter of law. This contention is based on public policy and the modern trend of the law which seeks to provide protection to the injured party by affording coverage under the omnibus clause to persons who use an insured's automobile lawfully. Furthermore, it can be argued that Willene's use was permissive in that the chain of events which culminated in the accident was initiated by the Judds' grant of permission to their son. Certainly it was within their power and authority to have prevented the accident by withholding the automobile from Kenneth.

In any event, there is evidence that Willene's operation of the automobile was to serve not only her own purposes, but those of Kenneth and his parents. We urge that under such a set of circumstances, Willene was covered by appellant's policy even though she may have been using the automobile against the Judds' wishes. We believe the better reasoned cases hold that where a permittee provides an automobile to a third person to be used to serve his purposes or those of the owner, that third person is covered under the standard automobile liability policy omnibus

clause even though the owner may have expressly instructed the permittee not to delegate use of the automobile.

Finally, we contend that by failing to deny coverage to Willene in accordance with Arizona's financial responsibility laws, appellant became obligated to extend the coverage of its policy to her regardless of any policy defenses it may have had.

B. Re Evidence on Implied Permission.

(1) Direct Evidence.

The foundation of appellant's first assignment of error is that a jury simply cannot find that an act has been done with the implied permission of one who has attempted to prevent its doing. It apparently is assumed in applying this premise to the facts of this case that the jury could not but believe that the Judds actually made a genuine attempt to prevent their automobile from being operated by Willene. Appellees contend this assumption is faulty.

In the portion of its brief dealing with the meaning of "implied permission" (pages 10 through 20), appellant has cited numerous cases dealing with the general subject of permissive use of motor vehicles under automobile liability insurance policies. Appellees can accept the definition of implied permission contained in *Hinton v. Indemnity Insurance Co. of North America,* 175 Va. 205, 8 SE 2d, 279 (1940) and which appellant urges upon the Court at page 10 of its brief. In a fact situation which appellant describes as "analagous" (and note that under this "analagous situation" the court found that an implied permission did in fact exist) the court defined the concept it was dealing with in the language which is set forth in appellant's brief at page 10, but finished its definition with the following all important sentence which is not included by appellant:

> "An implied permission is not, therefore, confined alone to affirmative action."

It may be true, as appellant contends, that there must be some affirmative evidence of an implied permission, but it certainly is not true, even according to the authorities it relies on, that there must be evidence of any affirmative action. In *Brower v. Employers' Liability Assur. Co.,* 318 Pa. 440, 177 Atl. 826 (1935) the court adopted this view in the following language:

> "The word 'permission' has a negative rather than an affirmative implication; that is, a permitted act may be one not specifically prohibited as contrasted to an act affirmatively and specifically authorized."

Hamm v. Camerota, 48 Wash. 2d 34, 290 P2d, 713 (1955) cited by appellant at page 10 of its brief actually stands for the proposition that in order that one be considered as insured under an omnibus clause, it must be shown that his use of the automobile was with the permission, express or implied, of the person designated in the policy as the named insured. The case turned on whether or not the grant of permission must come from the owner of the vehicle or the named insured where they are different persons. It was *not* contended that the named insured had given permission, express *or* implied, to the operator of the automobile and hence the case is of little value in determining the issues presented on this appeal.

Shedding further light on the meaning of the term "implied permission", we commend to the Court the definition in *Stoll v. Hawkeye Cas. Co. of Des Moines, Ia.,* 193 F.2d 255 (8th Cir. 1952) as follows:

> "Implied permission is actual permission circumstantially proved."

It is our contention that there was evidence presented to the jury of circumstances which establish an implied permission. True enough, there was also evidence that there was an express prohibition against the act in question and we agree that if the jury had believed this evidence outweighed the evidence of circumstances showing implied permission, they should have found that such implied permission did not in fact exist. But we urge, as appellant either fails or refuses to recognize, that the jury were *not* required to accept at face value the evidence of an express prohibition and that their special verdict demonstrates that as a matter of fact they rejected this evidence as less persuasive than that which tends to show that an implied permission existed.

As appellant points out throughout its brief, there was considerable testimony with regard to rules which had been expressed by the Judds governing their son's use of the family automobile. But this testimony showed not only that such rules or instructions had been discussed, it showed further that they had been ignored by Kenneth in practice. Illustrative are the following excerpts from Kenneth's testimony (Counsel's objections and the Court's rulings thereon omitted):

> "Q. About how many times during the period that you used this car before the accident happened, or any family car, did some sort of violation occur?
>
> A. Several times." (T. 88, lines 2 through 7)

> "Q. Can you tell us aside from the Mexico adventure about which we have already heard testimony about what was involved?
>
> A. When I kept the car out late or they had found out that I had gone somewhere that I hadn't told them I was going." (T. 88, lines 10 through 15)

"Q. (By Mr. Fox) Did you ever violate the instruction which had been given to you regarding purchase of gas and oil?

A. Yes." (T. 88, lines 20 through 24)

"Q. (By Mr. Fox) I will ask then again, Ken, if you can remember any instances, and describe them to the Court and the jury when you violated these instructions, aside from those you previously mentioned.

A. Oh, I imagine I violated just about all of them at sometime or other. I don't know when. I know before the accident they must have been. I imagine I violated all of them at some time or other. I don't remember whether exactly if my folks found out about them.

Q. Did your folks find out about all of your violations?

A. No.

Q. Did they find out about some of your violations?

A. Yes.

Q. Did your father interrogate you with regard to your use of the car?

A. Yes.

Q. Did you ever disclose to him at such interrogation any of your violations?

A. Yes, I imagine.

Q. Did he ever discover some violations on his own?

A. Yes.

Q. Can you tell us about that?

A. Well, he found out about the time that I went to Mexico from a friend, and another I believe he found a receipt of a citation that I had paid.

Q. By that you mean a traffic ticket?

A. Yes" (T. 89, lines 8 through T. 90, line 9)

"Q. (By Mr. Quisenberry) Approximately how many traffic citations have you received prior to February 29, 1959?

A. I don't remember. Five or so.

Q. And approximately prior to that date how many accidents were you involved in?

A. Two or three. Maybe four.

Q. Now, in each of these occasions had you got specific permission to use the car?

A. Yes. Oh, yes.

Q. Was your father aware of all of the accidents?

A. Yes.

Q. Was he aware of all the citations?

A. No." (T. 113, line 16, through T. 114, line 3)

The Judds admitted that they were aware of Kenneth's violations of their rules. From the testimony of Ray A. Judd (Counsel' objections and the Court's rulings thereon omitted):

"Q. (By Mr. Quisenberry) Now, Mr. Judd, did Kenneth generally obey these regulations?

A. He generally obeyed them, yes.

Q. Were there any instances when he did not obey them?

A. Yes.

Q. (By Mr. Quisenberry) Would you state to the jury what these instances were?

A. He had speeding tickets.

Q. (By Mr. Quisenberry) Approximately how many?

A. At that time I knew of about two, possibly three.

Q. And over what period of time?

A. Well, from the time he was driving up until the time of the accident. He had kept the car out later, and he took the car out of the valley. He wasn't supposed to take the car out of the valley without specific permission, and he did that.

Q. Where did he take the car?

A. He went to Mexico one day.

Q. How long did he stay?

A. He stayed overnight." (T. 21, line 12, through T. 22, line 15)

Lucille B. Judd testified as follows (Counsels' objections and the Court's rulings thereon omitted):

"Q. Aside from the time he went to Mexico and the occasion when he loaned the car to Willene when the accident happened, were there any occasions when he disregarded the instructions that you know of?

A. Yes. There was a few citations that I learned that he had tickets for speeding.

Q. You knew about that then before the accident?

A. Yes, sir." (T. 57, line 18, through T. 58, line 9)

In spite of Kenneth's disregard for their rules, the Judds continued to allow him to use the automobile and even went so far as to allow him blanket permission to use it to go to school and to allow him to have in his possession a set of keys for it. From Kenneth's testimony:

"Q. Was it necessary that you ask specifically for the use of the car each time you wanted to use it?

A. Well, like my father said, I had blanket permission to go to school. Other than that, yes.

Q. To go to ASU?

A. Yes." (T. 91, line 7 through 12)

"Q. (By Mr. Quisenberry) Did you have keys to the car?

A. Yes, I did.

The Court: For how long a period of time did you have in your possession from day to day the keys to the car?

The Witness: July, '58.

The Court: One month or more?

The Witness: From the time of the accident back it would have been eight months." (T. 94, lines 17 through 24)

Mr. Judd admitted the truth of his son's testimony as follows:

> "Q. Mr. Judd, do you intent to convey to this jury that each morning when he went to college he asked for permission of the car?
>
> A. Not on that occasion, but there was—he knew that it was just to go to college. When I told him he could take it to college that was a blanket more or less for those mornings. Any other time it had to be specific." (T. 20, lines 1 through 7)

> "Q. Mr. Judd, isn't it true that Kenneth had keys to this car?
>
> A. Yes. I had my keys on the key ring, and I didn't want to take it off all the time." (T. 24, lines 10 through 13)

The jury, then, were presented with the picture of a family which claimed to have applied strict control over the use of their automobile but were forced to admit that their rules and instructions had not been followed and were in fact rendered meaningless by Kenneth's actions and their knowledge of such actions. Perhaps even more inconsistent is the picture of the careful father who suspects there may be misuse of the family automobile, yet provides the suspect with a set of keys to it and clothes him with blanket authority to use it while going to college. We urge that these inconsistencies are such as were required to be resolved by a jury. Their special verdict demonstrates that they did *not* believe that whatever instructions were given to Kenneth were actually intended to prevent his delegation of the operation of the family automobile to Willene. An instruction given with a wink of the eye and with the intent that it be disregarded or with knowledge that it will not be applied is not genuine and has no meaning.

Although a great quantity of the direct evidence was admittedly to the effect that there was an express prohibition against allowing others to operate the automobile, still appellees urge that the direct evidence also shows without question a pattern of behavior by Kenneth accepted and acquiesced in by his parents from which the jury could find an implied permission for Willene to operate the automobile at the time of the accident.

In *Bradford v. Sargent,* 135 Cal. App. 324, 27 P.2d 93 (1933) the court contrasted express with implied permission in the following language:

> "Express permission would necessarily include prior knowledge of the intended use and an affirmative and active consent to it. An implied consent would indicate a sufferance of use or a passive permission deduced from a failure to object to a known past, present, or intended future use *under circumstances where the use should be anticipated.* Knowledge of some act or intended act on the part of the user by the owner should be necessary before consent to use should be implied." (Emphasis supplied.)

We urge that the direct evidence of this case establishes through a course of conduct circumstances where Kenneth's delegation of use to Willene should have been anticipated. The jury, therefore, was justified in returning its special verdict on the basis of the direct evidence alone.

(2) Circumstantial Evidence.

It is appellees' contention that appellant's failure to inform the Financial Responsibility Section of the Arizona Highway Department that Willene was not insured under the Judds' policy of insurance with regard to the accident which occurred on February 28, 1959, creates a strong inference that she was as a matter of fact operating the automobile covered by that policy with the permission of

the named insureds. We further urge that the jury were entitled to find for appellees solely on the basis of this undisputed and unimpeached circumstantial evidence. This proposition is adopted in *Hinton v. Indemnity Insurance Company of North America,* supra, one of the cases relied upon by appellant, where the court said:

> "The question of the grant or of the absence of permission to drive an automobile, when based on conflicting evidence is a question of fact for the jury. Permission may be shown by positive or circumstantial evidence. The jury may allow unimpeached circumstantial evidence to overcome opposed negative or questionable oral evidence, as it is in their province to pass upon the credibility of witnesses."

The facts in question were presented to the jury in part by a stipulation of counsel which was read to them as follows:

> "The Court: I ask the Reporter to now read for the information of the jury a stipulation which counsel for all the parties previously have entered into and do, on this occasion confirm.
>
> (Whereupon, the stipulation was read by the Reporter as follows:
>
> Mr. Fox: ... "It has previously been stipulated that—
>
> The Court: And is now confirmed?
>
> Mr. Fox: And is now confirmed that Alice Willene Williamson, now Alice Willene Judd, in completing and filling out and filing the accident report required by the Arizona Statutes, did claim insurance coverage under the automobile liability policy issued by plaintiff to Ray A. Judd and Lucille Judd, and in force and effect at the time of the accident; it's further stipulated, now confirmed, that the Financial Responsibility Section of the Arizona Highway Department received this report showing that coverage was claimed by

Alice Willene Williamson, now Alice Willene Judd, under the aforesaid policy; that pursuant to the statutes, the Financial Responsibility Section, sent to plaintiff, State Farm Mutual Automobile Insurance Company, the form called FR-1-A.

It is further stipulated that State Farm Mutual Automobile Insurance Company received this form from the Financial Responsibility Section and did not, within the time required by the Financial Responsibility Section or by Statute, or at all, return this form or in any way notify the Financial Responsibility Section of the Arizona Highway Department that it denied the coverage which Alice Willene Williamson, now Alice Willene Judd, claimed.

Mr. Grainger: So stipulated.

Mr. Quisenberry: So stipulated.)" (T. 134, line 20, through T. 136, line 2)

Appellant wholly failed to rebut the inference to be drawn from these facts. It presented no witnesses to offer explanation of its failure to present to the Financial Responsibility Section the same policy defense it urged to the jury. There was no suggestion that it did not have the information necessary to have informed the Financial Responsibility Section that it denied coverage at the time it received notice that Willene claimed coverage, and as a matter of fact, the uncontradicted testimony of the witnesses showed that it was so informed. From the testimony of Ray A. Judd (Counsel's objections and the Court's rulings thereon omitted):

"Q. Mr. Judd, after the accident when did the Plaintiff, State Farm Mutual Automobile Insurance Company, or someone representing them first contact you?

A. I believe I made the first contact. I believe I contacted the insurance company. I don't remember

whether it was that Saturday afternoon or Monday, but shortly after the accident I called the insurance company and told them the car was involved in the accident.

Q. (By Mr. Quisenberry) This was after you had spoken to Willene, after the accident?

A. Yes. She was filling out a form and asked me for that other information.

Q. And approximately how long was this after the accident?

A. I don't remember exactly. Very shortly afterwards.

Q. Now, did you inform them at that time that the car was operated by Willene?

A. Yes, I did.

Q. Now, did you at sometime subsequent to that make a statement to the insurance company, give a formal statement to them?

A. I believe so. They got in touch with me, or I called them. I don't remember which, but I did give them the full information that they requested." (T. 31, line 14, through T. 33, line 6)

Willene offered the following:

"Q. Now, Willene, were you contacted at any time by representatives of the Plaintiff's, State Farm Mutual?

A. Yes.

Q. And when did this occur? How long after the accident?

A. I don't know exactly how long. It was shortly after the accident." (T. 70, line 25, through T. 71, line 5)

Kenneth's testimony was as follows:

"Q (By Mr. Quisenberry) Kenneth, when were you first contacted by a representative of State Farm Mutual?

A. I don't remember.

Q. Were you so contacted?

A. Yes.

Q. Were you in any way involved in this accident?

A. No.

Q. What was the purpose, what occurred on the first time that you were contacted?

A. I don't remember.

Q. I didn't hear you.

A. I don't remember.

Q. Do you recall when you were first contacted?

A. No, I sure don't. It's been quite a while.

Q. Do you recall what was discussed?

A. The only thing I can really recall is whether there was permission or not." (T. 110, lines 9 through 25)

We contend that the facts as disclosed by the above unopposed testimony and by the stipulation which was read to the jury are wholly inconsistent with the position which appellant took at the time of the trial and takes on this appeal and that the only rational proposition which can be deduced from these facts is that Willene had permission to drive the Judds' automobile and was insured under the omnibus clause of appellant's policy of automobile liability insurance.

It is, of course, basic that, "It is the peculiar and exclusive province of the jury to decide upon the credibility of witnesses." Volume 4, Jones on Evidence at page 1863. In this case the jury had presented to them a basic inconsistency in the testimony offered by Kenneth and his parents; i.e., the inconsistency between a parent who claims on the one hand to have exercised strict supervision over the use of his automobile and on the other hand admits that he provided his son with a set of keys after knowing the son had used the automobile in a manner he disapproved.

The jury, of course, was asked to resolve these inconsistencies and, in order to do so, they were required to determine how much credit should be given the testimony of the witnesses regarding matters in which they were interested. There were ample indications that the testimony of the Judds would have to be scrutinized most carefully. For instance, the following exchange took place after the caption of the case had been read to Mr. Judd:

"Q. You are not named among those defendants, are you?

A. No.

Q. Not a party to this suit then?

A. That's right.

Q. Your connection with this suit is simply you are here as a witness for the Plaintiff, is that right?

A. Well, because my car was in use.

Q. I understand. It is true is it not that you came here to testify voluntarily; that you haven't been subpoenaed to come here?

A. That's right.

Q. At whose request did you come?

A. I believe it was Mr. Grainger." (T. 42, lines 7 through 19)

The record will show that Mr. Grainger was trial counsel for appellant.

Mrs. Lucille Judd's testimony was rather thoroughly impeached as a result of the following exchange:

"Q. Also you testified that you didn't know her well?

A. Not other than just the daughter of one of the tenants.

Q. Was she ever a guest in your house?

A. She may have come in a couple of times with Ken. None other than waiting for him, I guess.

Q. Mrs. Judd, you will recall that your deposition was taken on December 6, 1962, in our offices?

A. Yes.

Q. I'll read the questions and answers which appear starting at line one, page eighteen of that deposition:

'Question: Now, prior to the accident approximately how long had Kenneth dated the Williamson girl?

Answer: I imagine about six months.

Question: How frequently would he date her?

Answer: Well, being tenants we were well acquainted with the parents, so it was more or less a family reunion if we had them over for dinner, and the family came and included Willene.

Question: Would this include once a week or oftener than that?

Answer: Not oftener, no.'

"Do you recall those questions and those answers from your deposition?

A. Yes, sir.

Q. Do you believe that they are correct answers to the questions?

A. Yes, sir." (T. 58, line 21, through T. 59, line 22)

As for Kenneth, it was the Judds themselves who established him as one careless with the truth. Mr. Judd testified:

"Q. During the period that Kenneth was—before the accident and while he was using this car, did you ever interrogate him to find out whether or not he was obeying the instructions you laid down?

A. Yes. I asked him different questions about it.

Q. Did you ever ask him if he had loaned the car to anyone else?

A. Yes. That subject came up because I—

Q. Just a moment, Mr. Judd. The answer is yes, and what was his answer?

A. He told me that he didn't allow anybody to use it.

Q. And up to the time of the accident you then had no knowledge that he loaned it to anyone else, is that correct?

A. That's right.

Q. Is your knowledge any different now?

A. Yes, it is.

Q. Aside from the occasion when he loaned the car to Willene, do you now believe he loaned it to others?

A. I believe once or twice that he done it besides that.

Q. And yet you had interrogated him regarding this point, and he told you that he hadn't loaned it?

A. That's right.

Q. On those occasions then I take it he was lying to you?

A. Yes." (T. 40, line 17, through T. 41, line 15)

Mrs. Judd testified as follows:

"Q. Did you ever participate with your husband in interrogating Kenneth with regard to the use of the car, whether or not he had broken the instructions or disregarded the rules that were laid down?

A. Yes.

Q. You didn't learn—I think this was your testimony—You didn't learn of any instances when he had loaned the car to anyone?

A. Not prior to the accident, no, sir.

Q. Then if he had loaned the car, I take it he must have been lying to you on those occasions when you were interrogating him, is that right?

A. Yes." (T. 57, lines 5 through 17)

The jury, then, were faced with on the one hand direct testimony which it may very well have discredited and, on the other, by appellant's admission that could be deduced from the uncontroverted and unimpeached circumstantial evidence. Also for it to consider was the fact that appellant

had wholly failed to meet this circumstantial evidence or for that matter even to attempt to do so.

We urge that the circumstantial evidence of this case establishes that Willene's use was permissive and that since a cloud existed with regard to the veracity of the direct testimony, the jury was justified in returning its special verdict on the basis of this circumstantial evidence alone.

C. Re Court's Instruction on Implied Permission.

Appellant's second assignment of error is based on the theory that the jury could have been misled by the Court's instruction on implied permission because they were not expressly directed that one must have knowledge of an event if he is to consent to its occurrence. Appellees oppose this theory on the ground that the requirement of knowledge is implicit in the concept of permission and that there was no need to define that concept to the jury.

The challenged instruction was given to explain and distinguish permission which arises through implication and permission which is expressly recognized and created. That this was its sole purpose is apparent from a review of the instruction as given by the Court:

> "You are instructed that the word "permission" as used in plaintiff's automobile liability Policy No. 614491-F30-3, means either express or implied permission.
>
> "Express permission is that which is communicated from the named insured to the user of the automobile either directly or through an intermediary. You must not find that an express permission was given in this case.
>
> "The issue in this case is whether or not implied permission existed. Implied permission is that which arises out of the conduct of the parties and the circumstances surrounding their actions. It results from

such actions and may be found where the course of conduct of the parties is such as to manifest assent to or acquiescence in the act in question.

"If you find that the actions and conduct of Ray A. Judd and Lucille Judd are such as to signify their assent or lack of objection to the delegation of the use of the automobile in question to Alice Willene Williamson, now Alice Willene Judd, then you should find such use was with the implied permission of Ray A. Judd and Lucille Judd. If you do not find those necessary conditions, then you cannot find such implied permission." (T. 141, line 7, through T. 142, line 3).

Counsel for appellant sought no instruction defining permission at the time of the trial and none was given by the Court. The only instruction given which explained or defined the subject of permission or of implied permission is that quoted above and it is obviously not intended to educate the jury as to the requisites of a grant of permission. That knowledge is one of those requisites we readily admit. It is implicit in the term itself and to speak of "giving permission with knowledge of the facts" is to be redundant.

To the effect that knowledge is an integral component of permission, we offer the following language of *Atwater v. Lober,* 133 Misc. 652, 233 N.Y.S. 309 at 313 (1929), quoted with approval in *Bradford v. Sargent,* supra:

> "It cannot be said that one has permitted or suffered a thing when he had no knowledge of it; the words 'suffered' and 'permitted' necessarily imply knowledge, and do not impose any duty to prevent or to use reasonable care to prevent, except where he permits or suffers after acquiring knowledge. Clover Creamery Co. v. Kanode, 142 Va. 542, 129 S.E. 222".

In reviewing a trial court's instructions to the jury, an appellate court must give consideration not only to those

portions to which objection has been made, but to the whole of the instructions so as to determine whether the intent and effect of the claimed prejudicial material has been offset and corrected by other portions. *Beye v. Anders,* 159 Kan. 502, 296 P.2d 1049 (1956). In this case, when the court's comments regarding implied permission are considered as a whole, there is to be found no suggestion that it intended that the jury might find an implied permission in the absence of knowledge of the facts. The jury were directed that implied permission "arises out of the conduct of the parties and the circumstances surrounding their actions" and may be found to exist where the course of conduct of the parties "is such as to manifest assent to or acquiescense in the act in question". The instruction requires conduct which actually demonstrates assent or acquiescence and this requirement certainly makes it clear that implied permission can only be found where the parties are capable of giving actual permission; in other words, where they have knowledge of the facts and the ability to prevent the act in question. We contend that the instruction was clear and unambiguous and did not, as appellant has suggested, remove the element of knowledge.

Moreover, it seems to us that the particular portion of the instruction to which appellant makes exception is not objectionable even when read out of context. It simply directs the jury that they may find for appellees if they find that the actions and conduct of the Judds were such as to signify their assent or lack of objection to the act in question. It distorts the meaning of these words to attempt to read them to mean that permission could exist if the Judds failed to make objection even though they had no knowledge of facts which would cause them to believe that an objection might be or should be made in order to prevent a certain use of their automobile.

Appellant complains that its Instruction No. 3 should have been offered by the Court and contends that the only important distinction between this instruction and the one which was given is the element of knowledge. However, we submit that the real difference between appellant's requested instruction and that given by the Court is that the former requires that implied permission be demonstrated clearly and convincingly. Whether this is a correct statement of the law or whether implied permission can be proved by a simple preponderance of the evidence is moot for purposes of this appeal, for appellant has not complained of the Court's failure to instruct according to this theory. The point is that appellant's exceptions to the instructions were not based on a claimed subtraction of the element of knowledge from the concept of permission, but rather on the theory that "the proper test of implied permission as to *burden of proof* is that the implication must signify clearly and convincingly an understanding consent." (Emphasis supplied.) (T. 152, lines 12-14). The argument which appellant presented to the trial court related to the burden of proof and it cannot now adopt new theories. See *United States v. Waechter,* 195 F.2d 963, a 1952 decision of this Court, where it was held "that the government, whatever may be the strength of its present argument, cannot fairly urge as a ground for reversal a theory which it did not present while the case was before the trial court."

We urge, therefore, that the Court's instruction as given is a correct statement and could not in any way have misled the jury, couched as it was, in words of simple meaning and common understanding. In any event, even if the theories appellant now presents on this appeal were to be thought valid, there is no ground for reversal, for these theories were not urged upon the trial court.

D. Initial Permission as Applied to Delegation of Use.

All of the evidence is in accord that Kenneth had the express permission of his parents to use their automobile and that he gave Willene his express permission to use it. Appellees urge that on this set of facts it should be held that Willene is covered by the omnibus clause of the Judds' automobile liability policy regardless of any attempts made by the Judds to place limitation or restrictions on Kenneth's use.

The cases involving delegation of use by a permittee fall into three categories: (1) Those where the permittee has express authority to delegate use; (2) Those where nothing has been said regarding delegation of use by the permittee; and (3) Those where the permittee has received express instructions prohibiting delegation of use. If we assume that appellant's arguments are well taken, then it becomes necessary to examine the case law regarding a permittee's delegation and our attention is naturally drawn to the third category of cases. It would certainly be a correct statement of the law to say that the majority of the cases in this category hold there is no coverage to the second permittee under the standard automobile liability insurance omnibus clause. However, the law is progressing and the trend of the cases is to a more liberal view with regard to coverage questions toward the end that the innocent victim who suffers by reason of a highway accident will be protected.

Before making further comment on the case law, it seems appropriate to pause and review the nature of the subject matter which is involved in this appeal, for we feel that the persuasiveness of some of the holder cases applying narrow restrictive views to coverage questions may be somewhat dulled by a consideration of modern conditions

and the rapidity of change in these conditions over the past decades.

As time has gone by and the use of the automobile has increased, the law has seen fit to change and to progress so as to accommodate the various needs which have arisen. Our society today is perhaps more profoundly influenced by the manufacture, sale, maintenance and operation of automobiles than by any other single factor. The numbers of our population who own or operate automobiles and the number of miles of highways upon which to operate them have been constantly increasing during the course of our modern history so that a new, all time, statistical high is reached almost every year and perhaps even every month. The same kind of skyrocketing increase has been and is being shown by the statistics on highway accidents. There is an ever growing segment of our population which has been touched in some way by injury or death suffered as the result of a traffic mishap.

This situation has caused changes in the automobile liability insurance business. Some of these changes have come from the various state legislatures, nearly all of which have enacted some form of financial responsibility law and a few of which have gone so far as to enact compulsory liability insurance laws. Some have come from within the insurance industry itself, as witness the relatively recent development of uninsured motorist coverage. Some have come from our courts. The trend has been and is towards a more liberal interpretation of automobile liability insurance contracts, to the end that coverage may be expanded and the innocent victims of highway accidents may be protected and restored. Accordingly, we urge that public policy would best be served were the rule to be adopted by the courts of our land that persons who are operating an in-

sured automobile under some color of authority are within the omnibus coverage of the owner's policy.

Curiously, an excellent discussion of the problems facing a court free to adopt such a rule comes from a case decided thirty years ago. In *Brower v. Employers' Liability Assur. Co.,* supra, a case which deals with a deviation from the intended use by the original permittee as opposed to an unauthorized delegation of use, the court made the following comments:

> "One class takes the position that an indemnity or liability insurance policy is intended to protect any person injured by the legitimate operation of the car regardless of how or where the accident took place and regardless of whether the operator of the car was, at the time of the accident, using it for the restricted purpose for which it had been delivered to him in the first instance. In the view of these authorities a deviation, material or otherwise, from the terms of the bailment does not place the operator beyond the protection of the policy; "permission" is construed as applying solely to the bailee's right to the possession of the car in the first instance and is not limited by any restrictions or conditions the owner may impose on the use of the car."
>
> "Another line of authorities places a restricted construction on such omnibus clauses in indemnity policies and confines liability thereunder to such accidents as occur while the car is being used for the specific purpose for which permission to operate the car was granted; if there is a material deviation by the operator from the purpose or terms of the bailment, the insurance company is not liable to an injured party."
>
> "This court has not definitely laid down any rule on the subject, but it must be said that there is much force in the argument that as indemnity insurance on automobiles has become quite general, some attention should be given to the fact that the accident occurs

> while one has possession of the car under color of authority. The owner puts the car in the control of the user and in his power to do the act complained of. Such adherence would bring all indemnity insurance within the lines adopted by the Legislatures of the several states. It would seem that the very purpose for which these insurance policies are taken, or required to be taken, out is to give any person whose injuries are deemed by law to have been caused solely by the operation of an automobile some safe place for redress."

Courts generally, however, seem to have distinguished between situations involving a deviation from the intended purpose by the original permittee and an unauthorized delegation of use, for although a number of states have adopted the so-called "initial permission" rule with regard to the former situation, they have failed to apply it when faced with the latter. See for example *Cocos v. American Automobile Insurance Company,* 302 Ill. App. 442, 24 N.E. 2d 75 (1939).* In this case the court relied on the proposition that the insurer has not calculated its premium charge so as to underwrite the additional risks which are incurred if a named insured's permittee is allowed to delegate use of the insured automobile. Accordingly, it was held that the named insured cannot as a matter of law delegate his discretionary authority to afford liability coverage under the omnibus clause of his insurance policy. *Card v. Commercial Casualty Company,* 20 Tenn. App. 132, 95 S.W. 2d 1281 (1936) is to the same effect.

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*It is interesting to compare a more recent Illinois decision, *Hays v. Country Mutual Insurance Company,* 38 Ill. App. 2d 1, 186 N.E. 2d 153 (1962), which dealt with an unauthorized delegation of use. Cocos was disapproved, the court recognizing the "growing tendency on the part of the courts the country over, to adopt a liberal view as to the coverage afforded by the omnibus clause of liability policies."

It is worth noting that Cocos and Card, both of which are cited and relied upon by appellant, deal with a situation where the first permittee was an employee of the named insured and had been provided the automobile for use in connection with the employment. It is apparent that such situations are to be distinguished from those involving family cars and a close relationship between the named insured and the original permittee, both from an insurance underwriting standpoint and from a public policy standpoint. In this modernday world, the lending of "family" automobiles is commonplace and might certainly be said to be within the contemplation of firms engaged in underwriting automobile liability risks. An employer's automobile is more often intended for business purposes only and its use by an employee is frequently governed by rules and regulations adopted by the employer. It may be that the insurance underwriter should not be held to have contemplated that these rules and regulations will be broken and the car used for other than business purposes or by persons other than those expressly authorized by the named insured.

Appellees point out that it was never contended by appellant that the Judds could not authorize Kenneth to loan their automobile to Willene. Cocos and Card, therefore, are not persuasive except insofar as they tend to demonstrate how far some courts have gone in limiting the operation of the omnibus clause. Nor is *Ohio Casualty Insurance Company v. Plummer,* 13 F. Supp. 169 (D.C. S.D. Tex. 1935), cited and relied upon by appellant, inasmuch as it dealt with a delegation by one who had taken the automobile without the knowledge or consent of the named insured. *Colombia Casualty Company v. Lyle,* 81 F.2d 281 (5th Cir. 1936) and *Clemons v. Metropolitan Casualty Insurance Company,* La. App., 18 S.2d 228 (1944) both dealt with delegation of use by an employee who had been instructed

against such a delegation. We urge that these cases involving, as they do, an employer-employee relationship, are not persuasive in dealing with a situation involving a family or other close personal relationship.*

In this case, there was a close relationship between Willene and Kenneth at the time of the accident. There is no dispute but that she and her family lived in a residence rented from the Judds and located relatively close to the Judds' residence where Kenneth lived, nor is there any dispute that Kenneth and Willene were dating regularly prior to the time of the accident and, as a matter of fact, were married shortly afterwards. Mr. Judd testified as follows:

> "Q. Now, where did Willene live in relation to your home? How far away?
>
> A. Oh, probably would be a couple hundred feet to the rear and to the north of our home.
>
> Q. And she lived there from the time that she and her parents arrived in——
>
> A. They were renting that house from us, yes." (T. 16, lines 17 through 23)
>
> "Q. How frequently did your son, Kenneth, have dates with her?
>
> A. I can't remember that.
>
> Mr. Granger: It is outside his knowledge.
>
> Q. (By Mr. Quisenberry) To your knowledge?
>
> A. He might have one one week and maybe two dates another week.
>
> Q. Did this continue during this entire four or five months?
>
> A. No. It wasn't until after they lived there two or three months that they started dating like that.

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*See 7 Am. Jur. 2d 432 where the author remarks that the strict rule seems to have grown out of cases involving employee relationships while the adoption of a more liberal rule is laid to the use of many automobiles as "family cars". Under the liberal rule, authority to delegate is to be more readily assumed when the general use of the car is for social rather than business purposes.

Q. How frequently were they dating immediately prior to the accident?

A. Once or twice a week.

Q. Now, Mr. Judd, how long after the date of the accident was it prior to the marriage of your son and Willene?

A. State that question again?

Q. How long was it after the accident when your son and Willene were married?

A. Well, I believe it was a month or so afterwards." (T. 17, line 20, through T. 18, line 14)

There remains for discussion *State Farm Mutual Insurance Company v. Porter,* 186 F.2d 834 (9th Cir. 1950) which appellant has dealt with at length. Appellant overlooks the fact that this wase a case where the owner had expressly forbidden the first permittee to let anyone else drive his car. Suffice it to say here that appellees support the decision and the court's statement that "if the owner's permittee has entrusted the automobile temporarily to another, the latter's use is deemed to be with the owner's permission." This simply applies the philosophy of the initial permission rule to a case involving delegation of use and represents, to our way of thinking, the trend of the law in the country.*

We urge, therefore, that appellant's assignments of error are harmless since, under the authority of Porter and others of the more modern decisions, appellees are entitled to judgment as a matter of law on the undisputed facts of the case.

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*In *Allstate Ins. Co. v. Fidelity & Cas. Co. of N. Y.,* 73 N.J. Super 407, 180 A.2d 168 (1962) held that the language of the omnibus clause in an automobile liability policy is to be construed broadly in favor of the insured and the injured. Application of the initial permission rule to an unauthorized delegation of operation was approved.

E. Delegation Benefiting Permittee or Owner.

"The 'general rule' that a permittee may not allow a third party to 'use' the named insured's car has generally been held not to preclude recovery under the omnibus clause where * * * the second permittee, in using the vehicle, is serving some purpose of the original permittee. * * * it is more generally held that operation by a third person under such circumstances falls within the protection of the omnibus clause even where such operation is specifically forbidden by the named insured." 7 Am. Jur. 2d 435. See also the discussion and cases collected in an annotation in 160 ALR 1215.

The foregoing rule is apparently recognized by the court in *Duff v. Alliance Mutual Casualty Company,* 296 F.2d 506 (10th Cir. 1961), cited and relied on by appellant at page 11 of its brief. Emphasis was laid upon the fact that the particular purpose for which the second permittee borrowed the automobile and the actual use made of it were not to serve any purpose, benefit or advantage to either the owner or the first permittee. Apparently had the purpose, benefit or advantage of either the owner or the first permittee been served, the second permittee would have been afforded coverage by the court.

With this in mind, we turn to the testimony offered by Kenneth:

"Q. Well, before she took the car did you give her any instructions as to what she was to do with the car?

A. Yes.

Q. And what were these instructions?

A. To go and get her driver's license.

Q. Did you give her instructions to go do anything else?

A. Yes. I believe I did.

Q. What was that?

A. To stop by Fed-Mart if she had time.

Q. For what purpose?

A. To buy gas.

Q. Did you give her any instructions in regard to her return of the car?

A. I told her to be back when I got out of class.

Q. For what purpose?

A. To pick me up and take me home." (T. 104, lines 9 through 24)

The fact that there is an express prohibition does not diminish the effect of the rule. See *Loffler v. Boston Ins. Co.,* Mun. Ct. App. Dist. Col., 120 A.2d 691 (1956) and *Brooks v. Delta Fire & Casualty Co.,* La. App., 82 So.2d 55 (1955).

We urge, therefore, that the evidence before the Court demonstrates clearly that Willene's use of the Judd automobile was serving some purpose of the original permittee, Kenneth, as well as his parents (to buy gasoline for the car and to pick Kenneth up and take him home). We urge that this evidence requires that the judgment of the Trial Court be affirmed under the rule which provides that where the automobile is being operated on behalf of the first permittee or for the mutual purposes of the second permittee and the owner or first permittee, the operator is covered under the omnibus clause even though the first permittee may have been instructed not to allow anyone else to use the automobile.

F. Financial Responsibility Law.

Title 28, Chapter 7, of the Arizona Revised Statutes is denominated the "Uniform Motor Vehicle Responsibility Act". It provides that the driving privileges of persons involved in serious highway accidents shall be revoked unless:

(1) A deposit of cash sufficient to satisfy any judgment which may result from the accident is made with

the Superintendent of the Motor Vehicle Division; or, in the alternative,

(2) The person involved is protected by a policy of automobile liability insurance.

It is further provided as follows:

"Upon receipt of notice of the accident, the insurance company or surety company which issued the policy or bond shall furnish for filing with the superintendent a written notice that the policy or bond was not in effect at the time of the accident, if such was the case. If no such notice is received, the policy or bond shall be deemed to be in effect for the purposes of this chapter." (A.R.S. Sec. 28-1142 (D))

The foregoing requirement of the Arizona statutes must be distinguished from the procedure established by statutes of other states where there is no coverage unless and until an appropriate form of acknowledgment is filed by the insurer. In Arizona the company is required to deny coverage and if it fails to do so, its policy "shall be deemed to be in effect". The word "deemed" is imperative in form and no other construction of it is possible. *McCluskey v. Hunter,* 33 Ariz. 513, 266 P. 18 (1928). It is apparent then that the Legislature intended that upon the failure of the insurer to give the notice contemplated by A.R.S. Sec. 28-1142 (D), the coverage claimed is no longer subject to challenge.

In this case, appellant received notice of the accident and of the fact that Willene claimed coverage under its automobile liability policy, yet did not file with the superintendent any notice that its policy did not cover Willene. These facts are established by a stipulation of counsel entered into at the time of the trial (T. 132, line 22, through T. 133, line 22) and previously set forth in full in this brief. Laying aside for the moment the inferences which we urge are to be drawn from appellant's failure to assert its

claimed policy defense, appellees contend that appellant's policy covers Willene *as a matter of law*. See *Behringer v. State Farm Mutual Auto, Ins. Co.,* 275 Wis. 586, 82 N.W. 2d 915 (1957) and *Laughnan v. Aetna Casualty & Surety Co.,* 1 Wis. 2d 113, 83 N.W. 2d 747 (1957).

Under the authority of the *Behringer* and *Laughnan* cases, the insurer becomes liable to the actual limits of its policy and not to the limits prescribed by the statute where they are lower. We commend the rule of these Wisconsin cases to the Court as in accord with the public policy of the State of Arizona as announced in *Schecter v. Killingsworth,* 93 Ariz. 273, 380 P.2d 136 (1963). There the Court stated: "The Financial Responsibility Act has for its principal purpose the protection of the public using the highways from financial hardship which may result from the use of automobiles by financially irresponsible persons."

In *Jenkins v. Mayflower Insurance Exchange,* 93 Ariz. 287, 380 P.2d 145 (1963) the Court ruled that certain provisions of the Financial Responsibility Act must be considered as having been written in every policy of motor vehicle liability insurance. If this case means, and we urge that it does, that motor vehicle liability insurance in the State of Arizona is subject to the statutory requirements of the Financial Responsibility Act to the contractual limits of each individual policy, then it would seem to follow that by failing to deny coverage under the act, the entire policy would be deemed to be effective.

We urge, therefore, that appellant has brought this appeal on the grounds of harmless error, since on the facts as established by stipulation of counsel, Willene is covered under appellant's policy in spite of any policy defenses appellant may claim to have, by reason of this failure to deny such coverage in accordance with the financial responsibility law of Arizona.

CONCLUSION

It is respectfully submitted that the judgment of the Court below should be affirmed.

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We certify that in connection with the preparation of this brief, we have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing brief is in full compliance with those rules.

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